

verbal content. Jazz music illustrates this point. The lyrics accompanying jazz music are often non-literal vocal intonations. In musical genres such as scat and bebop, this is the norm, rather than the exception. Some jazz artists such as Bobby McFerrin are renowned for their ability to use their voices as musical instruments rather than to convey particular ideas through verbal expression.

Similarly, performances in genres other than jazz music often cannot be effectively captioned. Rock-and-roll lyrics, for example, are often unintelligible,<sup>16</sup> and rap, hip-hop and reggae music would likely cause major transcription problems because of their use of slang, hip-hop, and other stylized lingo.

Even when music lyrics can be effectively translated into text, captions are inherently limited in their ability to enhance the viewing experience of *musical* performances for persons with hearing disabilities. The primary reason for listening to vocal music performances is to appreciate the sound and vocal delivery style of the artist, delivered to the accompaniment of instrumental music. Captioning cannot replicate that experience. In light of this, it is highly doubtful that captioning of music performance programming will result in any significant level of viewership of music performance programming by persons with hearing disabilities; such persons are far more likely to choose to view non-musical entertainment or informational programming, where the absence of music will not as significantly diminish the worth of the captioned programming to the hearing impaired viewer. While BET Holdings appreciates the

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<sup>16</sup> See RIAA Comments at 3 n. 3 ("We direct the Commission's attention to the 1963 Congressional investigation of alleged objectional lyrics contained in the song "Louie, Louie" by the Kingsmen. After holding a hearing and having the recording played on various speeds and analyzed by the Federal Bureau of Investigation, the Committee concluded the lyrics were 'indecipherable at any speed.'")

desire of persons with hearing disabilities to have the maximum amount of video programming captioned, the Commission must recognize that under the cost/benefit standard prescribed by Congress, musical performances -- whether live or prerecorded -- realistically should rank as a very low priority for captioning and should be exempted as a class from required captioning.

**2. Alternatively, If The Commission Does Not Exempt *All* Music Performance Programming, It Should At Least Exempt *Primarily Instrumental Music Performance Programming***

In the NPRM, the Commission tentatively concluded that musical performances that are "primarily instrumental" should be exempt from mandatory captioning. NPRM ¶ 82. Advocacy groups for persons with hearing disabilities who commented on this issue agreed with the Commission's proposed exemption.<sup>17</sup> BET Holdings submits that if the Commission does not exempt all musical performance programming, it should at the very least exempt "primarily instrumental music performance programs", as described below.

BET Holdings proposes that the Commission employ the term "primarily instrumental musical performance program," defined as "a video program of which at least fifty percent of the program content consists of musical performance(s) without literal lyrics"; commercials and other interstitials would not be considered as part of program content for purposes of such calculation. This definition would thereby establish that the *program* should be classified by its overall composition, rather than by individual segments that typically make up a program. For example, a program consisting of ninety percent orchestral performance and ten percent narrative discussion or vocal performance would be fully exempt.

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<sup>17</sup> Comments of The Coalition of Protection and Advocacy Systems (Feb. 28, 1997) at 7, filed in response to the NPRM; Comments of the National Captioning Institute (Feb. 28, 1997) at 10-11, filed in response to the NPRM.

This proposal is both economically sensible and in accord with the viewing patterns of persons with hearing disabilities. If the major part of a program consisted of instrumental music and therefore was not required to be captioned, it is unlikely that any significant number of hearing impaired viewers would watch the program merely to see the small amount of programming with literal verbal content that would be captioned. The proposed definition includes music programming containing non-literal vocal intonations (*e.g.*, scat and bebop jazz music) since, as discussed above, it is practically difficult and makes little sense to caption sounds uttered purely for their artistic value that do not to convey particular ideas through literal verbal expression. Finally, as explained above, it would be a tremendous waste of a network's scarce resources to be forced to pay for captioning services, which at the current time generally charge hourly on a program-by-program basis, for the captioning of an entire show when, for example, only five or ten minutes of the content of the hour-long program is captionable.

**C. "INS AND OUTS" FOR MUSIC PROGRAMMING SHOULD BE EXEMPT FROM REQUIRED CAPTIONING**

Even if the Commission were to impose a captioning requirement on music videos or music performance, it should exempt "ins and outs," the short segments of dialogue used to transition into and out of the presentation of music videos and music performances.

BET, as the producer of the "ins and outs" in its programming, will directly bear the cost and administrative burden of captioning this material, even if the music videos or music performances presented are captioned by others or are not required to be captioned. The requirement of captioning "ins and outs" would add significantly to the cost of, and complexity of producing, music video and music performance programs and would force networks such as BET to eliminate or reduce the number of "ins and outs" included in such programs. For

example, "Video Vibrations," a three-hour music video program, contains approximately 6 1/2 minutes of "ins and outs", or about five percent of the program's 130 1/2 minutes of non-commercial time. Because BET has no in-house captioning facilities, it would have to employ commercial captioning services to caption this programming. However, these entities currently charge by the programming-hour for their services, even when part of the programming (*e.g.*, some or all of the music videos) is already captioned. Therefore, even if all of the music videos included in "Video Vibrations" were already captioned by the record producers, under current billing practices, BET would still be forced to spend \$3,600 (3 hours x \$1,200 per hour) to caption the 6 1/2 minutes of "ins and outs" on this show. Likewise, even if music videos were exempt from required captioning, BET would still be forced to spend \$3,600 per episode to caption 6 1/2 minutes of "ins and outs." In either case, the net effect would be to create a regulatory incentive for BET and other networks to drop "ins and outs" from music video shows to avoid the excessive cost of captioning such material.

In short, it is clear that the marginal benefits of captioning "ins and outs" are well exceeded by the cost and administrative burden of being required to do so. Therefore, whether or not the Commission requires all or most music videos to be captioned, it should exempt "ins and outs" so long as they are not a principal component of the music video program, *i.e.*, so long as they comprise less than twenty percent of the program content, excluding commercials and interstitial messages.

#### **D. BACKGROUND MUSIC SHOULD BE EXEMPTED FROM REQUIRED CAPTIONING**

In the NPRM, the Commission tentatively concluded that background music should be exempt. NPRM ¶ 82. BET Holdings supports the Commission's tentative conclusion, both as a matter of common sense and economic reality.

Although the Commission did not define "background music," it would seem that the Commission is referring to music played during a video program that is incidental or secondary to, and not an integral part of, the primary program content. Of course, the fact that the music is *background* music implies that there is program content in the foreground (usually involving verbal content) that may be required to be captioned. Thus, mandated captioning of background music would seem to necessitate *two* sets of captions on the screen -- one for the foreground audio and one for the background audio. This result would (1) complicate, and raise the cost of, captioning, (2) consume a substantial amount of the screen, and (3) clutter the screen with two sets of captions. Even where background music captioning is included within the primary captioning of the programming, the effect often is to complicate the captioning and confuse the viewer, with little added value in terms of the worth of the programming to the hearing impaired viewer.

Requiring the captioning of background music would impose a tremendous expense, and burden, on the industry. BET Holdings' Action Pay-Per-View network, for example, features numerous movies, all of which have substantial amounts of background music. Given that background music is inherently an incidental and secondary part of the content of the video program, that captioning of background music can confuse the viewer, and that captioning is simply not capable of reproducing the effect that background music is meant to have, the burden

of captioning it would considerably outweigh any benefit to the viewer. Background music should, therefore, be exempt from required captioning.

**IV. THE COMMISSION SHOULD EXEMPT FROM REQUIRED CAPTIONING NICHE SPORTS PROGRAMMING THAT DOES NOT INVOLVE MAJOR PROFESSIONAL OR COLLEGE TEAMS, MAJOR NATIONAL AND REGIONAL SPORTS EVENTS, OR THE LARGE AUDIENCES AND PRODUCTION BUDGETS ASSOCIATED WITH SUCH EVENTS.**

In tentatively concluding that sports programming should not generally be exempt from captioning requirements, the Commission recognized that "[t]here may be, however, some types of sports programming for which a closed captioning requirement would be [economically] burdensome. . . ." NPRM ¶ 84. Although the Commission's discussion of such potentially exempt programming was limited to *local* sports programming, the Commission implicitly acknowledged that it is not the local nature of sports programming that is significant in determining whether or not programming should be subject to a captioning requirement but, instead, whether the programming "involve(s) major league sports teams, large production budgets, and may achieve large audiences comparable to that of some national services." *Id.* As explained below, certain types of regional and national niche sports programming should also be exempted from the proposed captioning requirement, where that programming does not involve major professional or college teams, major national or regional sports events, or the large production budgets and large audiences associated with such major sports events.

Captioning of sports programming in general is very costly. Coverage of live sports programming requires the use of stenocaptioners or electronic newsroom captioning, which the Commission has acknowledged are extremely expensive. NPRM ¶¶ 20-21. Moreover, most

sports programming has little or no shelf-life and, thus, generally will not be shown again after the original captioning. Consequently, the substantial cost to a programmer of captioning a program that will be viewed only once often cannot be justified economically, and this is particularly true where the viewing audience for the event is far smaller than those reached by national broadcast and cable networks for major regional and national sports events.

Under these circumstances, captioning requirements have the potential to thwart the dissemination of national and regional niche sporting events that do not attract large audiences, and for which large production budgets are not available. The diverse sports programming carried on BET is a prime example. BET's focus is on disseminating sporting events involving schools and teams of particular interest to its target audience -- African Americans -- that are not likely to be shown by major broadcast and cable networks. For instance, BET has long carried the football games of historically black colleges and universities in the CIAA, SIAC, MEAC and SWAC athletic conferences. These colleges and athletic conferences receive little coverage, if any, from major broadcast and/or cable networks. Carriage by BET benefits these institutions by providing them with financial support (in the form of television rights fees from BET) and national exposure for their sports programs. BET's coverage of these games, which are transmitted live or are recorded for same-day transmission, typically garners low ratings, particularly in relation to the production expense of such games, because of the small niche market and limited viewing audience. Nonetheless, these games are an important part of black culture, and BET has continued to carry the games despite their marginal commercial performance. However, budgetary constraints have forced BET to reduce the extent of its carriage of these games in recent years. If the Commission were to now require that these games

be captioned, that additional cost could well force BET to entirely eliminate coverage of the games from its schedule.

Similarly, BET provides live coverage of the American Basketball League, the newly-formed professional basketball league for women. BET's portion of the production costs for these games is kept extremely lean, averaging about \$9,000 per game, which enables BET to distribute these events despite their low television ratings. Imposition of a captioning requirement -- which would entail an additional production cost of approximately \$2,000 per game, or 22 percent of the current production budget -- would likely make it economically infeasible for BET to justify continued carriage of these games.

While BET distributes its niche sports programming nationwide, everything about that programming -- the content of, the audiences attracted by, the production budgets devoted to, and the revenues generated by the programming -- is qualitatively and quantitatively different from, and simply cannot be compared to, the major cable and broadcast networks' coverage of major professional and college sports teams and events, programming that appeals to the largest national audiences. Thus, for example, CBS's captioning of the 1995 and 1996 NCAA tournaments, to which the Commission refers (NPRM ¶ 66), is totally irrelevant to the question of whether the economic burden of captioning niche sports events should be heaped on networks such as BET, which seek to televise sports events whose television ratings objectively cannot justify the cost of captioning and that otherwise would receive little or no television coverage.

Not only would the expense of captioning this niche sports programming be prohibitive, the value to the hearing impaired of captioning this programming would be relatively low. First, the more limited appeal of BET's niche sports programming among audiences in general is likely



to be equally true among persons with hearing disabilities. As recognized by the Department of Education ("DOE") in distributing grants for closed captioning, the larger the general viewing audience for a program, the larger the hearing impaired audience is likely to be, and vice versa.<sup>18</sup> Thus, this programming, even if captioned, would be likely to appeal to only a very limited group of hearing impaired persons. Second, sports programming is primarily visual, and extensive statistics and analysis for sports programming are almost always provided on screen in graphic and textual form.<sup>19</sup> Consequently, captioning of this type of programming is not as important as, for example, captioning of programming with extensive dialogue and little or no textual and graphic enhancements. Clearly, in relative terms, the value to persons with hearing disabilities of requiring captioning of niche sports programming such as BET's is far more limited than the value of requiring captioning of other types of programming. Moreover, the potential downside of requiring closed captioning for niche sports programming such as BET's -- the termination of coverage of these events to all viewers, including both the hearing and persons with hearing disabilities -- outweighs the limited benefit of requiring captioning.

Finally, in concluding that captioning of sports programming is not, in general, economically burdensome (NPRM ¶ 84), the Commission has placed undue emphasis on the fact that some large programming entities have engaged in voluntary captioning. To date, the

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<sup>18</sup> Dept. of Education Office of Special Education and Rehabilitation Services, Notice of Final Priorities, 61 Fed. Reg. 4168, 4168, Feb. 2, 1996 ("captioning of local television news programs is important. However, with the limited amount of federal dollars, it is deemed advantageous to the larger population to spend them on national level captioning").

<sup>19</sup> For example, BET displays the following textual information periodically throughout its college football productions: game score, scoring summaries, game clock information, downs and yardage information, specialty statistics (*e.g.*, individual player game and season statistics), other game scores and conference standings.

evidence suggest that the large majority of voluntary captioning has been done by the major broadcast networks for nationally televised sporting events with grant money from the DOE. Again, the revenues generated by such major sporting events fundamentally distinguish them from niche sporting events. Moreover, the Commission should not underestimate the influence of DOE grants, which historically were distributed to those programmers with the largest viewing audience (*i.e.*, not to niche programming networks such as BET) and which may not be available to anyone in the near future,<sup>20</sup> on the ability of major networks to absorb the cost of captioning sports programming.

The Commission may ultimately conclude that some captioning of certain sports programming is appropriate. However, it should not at the present time impose that requirement on programming that does not feature major professional or college teams or events, or involve the large audiences and production budgets associated with such major sporting events. Unless niche sports events such as those presented by BET are exempted from the proposed captioning requirement, it is a certainty that many programmers such as BET will be forced to drop such programming, and audiences such as BET's, who depend on it to bring them diverse sports events that does not fit the commercial profile of the major broadcast and cable networks, will be deprived of the opportunity to view such diverse programming.

## **V. CONCLUSION**

BET Holdings supports the general goal of closed captioning of video programming. However, the cost-benefit analysis that Congress directed the Commission to apply compels the

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<sup>20</sup> See NPRM ¶ 46 ("the availability of [DOE grants] for captioning in the future is unclear")

conclusion that certain categories of programming should be exempt from any captioning requirement.

BET Holdings respectfully requests that any rules adopted by the Commission in this proceeding include the following provisions:

(a) Music videos shall be an exempt class of video programming for purposes of the closed captioning requirements. Alternatively, music videos provided by "small-label recording companies" shall be an exempt class of video programming.

(b) Musical performance programs, defined as video programs comprised of at least fifty percent live and/or prerecorded musical performances, shall be an exempt class of video programming for purposes of the closed captioning requirements. Alternatively, musical performance programs (*i.e.*, video programs comprised of at least fifty percent live and/or prerecorded musical performances without literal lyrics) shall be an exempt class of video programming.

(c) "Ins and outs", defined as short segments of dialogue used to transition into and out of the presentation of music programming, shall be an exempt class of video programming for purposes of the closed captioning requirements, so long as such "ins and outs" comprise less than twenty percent of the content of the program, excluding commercials and interstitials.

(d) Niche sports programming that does not involve major professional or college teams, major national and regional sports events, or the large audiences and production budgets associated with such events shall be an exempt class of video programming.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Burt A. Braverman", is written over a horizontal line.

Burt A. Braverman

Maria T. Browne

James W. Tomlinson

**COLE, RAYWID & BRAVERMAN, L.L.P.**

1919 Pennsylvania Avenue, N.W.

Suite 200

Washington, D.C. 20006

(202) 659-9750

Attorneys for

**BET HOLDINGS, INC.**

March 31, 1997

In the Matter of

Closed Captioning and Video Description  
of Video Programming

Implementation of Section 305 of the  
Telecommunications Act of 1996

Video Programming Accessibility

MM Docket No. 95-176

**DECLARATION OF MAURITA K. COLEY**

I, Maurita K. Coley, am Executive Vice-President of BET Networks, Inc., the parent company of BET, BET On Jazz, and Action-Pay-Per-View. In this capacity, I am familiar with all aspects of the networks' business operations.

I declare under penalty of perjury that I have reviewed the attached Reply Comments of BET Holdings, Inc., that the facts stated therein are true and correct to the best of my knowledge, information and belief, and that I am authorized to make this declaration.



Maurita K. Coley

Executed on March 31, 1997.